IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 and 74-157

THE STATE OF NEW YORK and THE NEW YORK STATE HOUSING FINANCE AGENCY,
Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,
Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,
Petitioners,

against

MILTON FORMAN, et al.,
Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS, THE STATE OF NEW YORK AND NEW YORK STATE HOUSING FINANCE AGENCY

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A.

Beclouding the atmosphere seems to have been deemed essential to a maintenance of the respondents' position. We submit that the significant constitutional issue here presented should not be so beclouded.

The respondents (pp. 4, 20, 77) make a desperate attempt to convince this Court that the State (like the state which *owned* a railroad in *Parden* v. *Terminal Railway,* 377 U.S. 184 (1964) has a *proprietary* interest in the cooperative housing project whose construction it has regulated and whose operation it continues to regulate. But the mere fact that it received a fee for regulating construction of the project did not establish it as a proprietor. The amount of the fee, although it might be considered extraordinary for the supervision of the construction of an ordinary project, amounts to only approximately 1% of the total construction cost of "Coop City" and undoubtedly failed to compensate the State fully for exercising its regulatory function.

The weakness of respondents' position is emphasized by the fact that it did not even dare to suggest in either of the Courts below that the State had a proprietary interest in Coop City. We are confident that this Court will not be misled by this new emphasis. The individual plaintiffs here would be more than amazed to discover that they had been or become subscribers to shares in a state-*owned* project.

Respondents' conception of New York's housing program before 1955 is equally distorted. Cooperatives were a form of state-aided housing long before that. This is demonstrated by the dispassionate opinion of Judge FROESSEL in *Fruhling* v. *Amalgamated Housing Corp.,* 9 N Y 2d 541 (1961) app. dism. 368 U.S. 70 (1961), where in dealing with the historical development of Public Housing Law, § 182, subd. 3, par. (b), he referred to a 1948 Housing Division memorandum and stated (9 N Y 2d at p. 549):

> "The historical development of paragraph (b) of subdivision 3 clearly demonstrates that the purpose of the provision was to accord tenants in co-operative projects under the act *separate* and *special* treatment

in light of the fact that they had to purchase stock as a condition precedent to occupancy. This is apparent from the memorandum of the Division of Housing itself at the time paragraph (b) was enacted (N. Y. Legis. Ann., 1948, p. 227) and by the very provisions of paragraph (b) (L. 1948, ch. 610). Thus paragraph (b) was introduced by the phrase 'Notwithstanding the provisions of paragraph (a)'; and it initially provided that the income to rental ratio for continued occupancy in co-operatives was to be 7 to 1 and 8 to 1 as opposed to 5 to 1 and 6 to 1 for non-co-operative housing under paragraph (a); and, further, an *unlimited* grace period, within the discretion of the Commissioner, for continued occupancy of over-income tenants was provided. In 1951, when the surcharge provisions were introduced into paragraph (a) (L. 1951, ch. 532), a like provision was not added to paragraph (b), and, when amending paragraph (b) in 1960, the Legislature in a note annexed to the amendment (1 Laws of New York, 1960, p. 920, n.) expressly recognized that it had theretofore accorded tenants in co-operatives special treatment, particularly in regard to surcharges."

The fact is that the Public Housing Law provided for a form of cooperative organization in state-aided projects at least as early as 1928,* when a portion of State Housing Law, § 16 (L. 1928, § 722) provided explicitly:

"When tenants own stock in a limited dividend corporation incorporated under this act, a sinking fund

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* As a matter of fact, initial occupancy of Amalgamated Houses began in December, 1927. See Report of N.Y. State Board of Housing, February 29, 1928 to Governor Alfred E. Smith and to the Legislature. New York Legislative Document (1928) No. 76, stated (p. 17):

"The Amalgamated project was completed in December and formally opened for occupancy on Christmas Day. It is being operated on a cooperative basis, and most of the tenants are holders of stock in the Corporation."

> may with the approval and subject to the regulations of the board be set up and maintained out of the net profits applicable to surplus and used subject to the regulations of the board for the purchase at not to exceed par and accrued interest of the stock held by tenants ceasing to be occupants of the buildings; shares so purchased may be resold by the corporation."

Respondents' argument of "waiver by conduct" (70-78), therefore, has no true factual or historical basis.

B.

The Securities and Exchange Act of 1934 did not include the States within the definition of "persons" controlled by that Act. Nor should the State itself be deemed a "person" within the meaning of the Civil Rights Act. *Monroe* v. *Pape,* 365 U.S. 167 (1961).

C.

As to the State Housing Finance Agency, which furnished the financing essential to complete the project in which the respondents dwell—and would have no such dwelling place without such financing—this suit is utterly frivolous. It is virtually fantastic that any federal court should permit the claims pleaded against this *financing* agency to be given any serious consideration. How could plaintiffs be *hurt* by an agency which lent the money needed to complete the project undertaken by the corporation whose shares they had purchased?

D.

As to the State itself, the respondents' efforts to distinguish this Court's decision in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), which the Court of Appeals completely disregarded (a fact which respondents do not even blink at) seem futile. The rationale of *Edelman* is sound and should not be so soon whittled away.

E.

The respondents, in alleging an express waiver of immunity, by the provisions of Private Housing Finance Law, § 32(5), have overlooked two facts. First, it was not intended as an *extension* of the State's liability to suit. The memorandum of the State Division of Housing and Community Renewal, in support of the legislation, clearly stated that it sought only to "preserve" such liability. New York State Legislative Annual (1964), p. 343. Second, the paragraph including the alleged waiver was clearly intended to apply only to *state* court suits for it included a sentence, not quoted by respondents,* directing that "no costs" should be awarded against the commissioner, the state or the supervising agency, as the case may be, "in any such litigation". The Legislature in New York could hardly have contemplated controlling the imposition of costs in a federal or other court not subject to its jurisdiction. Certainly, the New York statutory provision did not contain the express consent which this Court has required to a suit in the federal courts. *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 172 (1909); *Graves* v. *Texas Co.*, 298 U.S. 393, 403-404 (1936); *Great Northern Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944); *Ford Co.* v. *Dept. of Treasury*, 323 U.S. 459, 462-463, 465-466 (1945); *Kennecott Copper Corp.* v. *Tax Commission*, 327 U.S. 573 (1946). Indeed, in the last-named case, this Court, referring to the *Read* and *Ford* cases, stated (p. 578):

> "We said in those cases that since state laws could not affect procedure in federal courts, it was to be inferred that only state courts were included in the States' consent to suit."

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* The sentence omitted by the respondents reads:
"No costs shall be awarded against the commissioner, the State, or the supervising agency, as the case may be, in any such litigation".

Presumptively and clearly, New York was dealing with costs *in its own courts*, rather than setting up a pre-condition to suits in courts of another jurisdiction.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the complaint herein should be dismissed against the State and its Housing Agency.

Dated: New York, New York, April 9, 1975.

Respectfully submitted,

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